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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71 - 618

JOE BRECK GANTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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II. *Certiorari should be granted to determine whether petitioner's conviction under an indictment returned by a pre-Jury Selection and Service Act of 1968 grand jury deprived petitioner of due process of law and of his right to a grand jury representing a fair cross-section of the community because:* 11, 12

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III. *Certiorari should be granted to determine whether the district court's failure to hold a hearing on the question of the composition of the petit jury as provided for by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1867, denied petitioner due process of law and a fair trial by a jury of his peers, especially since the district court itself expressed doubts about the jury plan.* 17

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No._____

JOE BRECK GANTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Opinions Below

The United States District Court for the Northern District of Alabama issued no written opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is printed in the separately filed Appendix.

Jurisdiction

Petitioner Gantt was convicted in the United States District Court for the Northern District of Alabama of conspiring to obstruct, delay and affect commerce by extortion in violation of 18 U.S.C. § 1951(a). The judgment of the United States Court of Appeals for the Fifth Circuit affirming the conviction, Rives, J., dissenting, was entered on June 23, 1971. A timely petition for rehearing *en banc* was denied October 7, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I. Whether the trial court's jury charge improperly limited and obscured the jury's consideration of the question of interference with interstate commerce under 18 U.S.C. § 1951(a) and thereby amounted to partial direction of the verdict which denied petitioner due process of law and trial by jury under the fifth and sixth amendments of the Constitution of the United States.

II. Whether a conviction obtained under an indictment returned by a pre-Jury Selection and Service Act grand jury deprived petitioner of due process of law and of his right to a grand jury representing a fair cross-section of the community because:

A. The method of compiling the list of names from which the grand jury was drawn utilized a "key man" system of selection, which reposed unsupervised discretion in the selection of names in the key men; and

B. Seven thousand names drawn from a stale jury list were added to the list of prospective jurors supplied by the key men.

III. Whether the district court's refusal to grant a hearing on the composition of the petit jury, as provided for by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1867, denied petitioner due process of law and a fair trial by a jury of his peers, especially since the district court itself expressed doubts about the jury plan.

IV. Whether in a criminal case involving extensive publicity, it is permissible at the appellate level to substitute a subjective finding that no prejudicial publicity existed for the objective inquiry into repeatedly-alleged prejudicial effects of publicity on jurors which is nor-

mally afforded defendants in criminal trials, but was in this case denied.

Constitutional and Statutory Provisions Involved

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any persons or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

The pertinent portion of the fifth amendment states that:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person . . . be deprived of life, liberty or property without due process of law. . . .

The portion of the sixth amendment involved herein provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1871, are printed in the separately filed Appendix.

Statement of the Case

a. *The Proceedings Below*

On August 2, 1968, petitioner Gantt and Messrs. Flow-

ers (Attorney General of the State of Alabama from 1963 to 1967) and Hyde were charged by indictment with conspiring to obstruct, delay, and affect commerce by extortion in violation of 18 U.S.C. § 1951(a). A motion to dismiss the indictment and for a hearing on an alleged improper composition of the grand jury was denied on January 23, 1969, as was a motion to sequester the jury. During the trial numerous motions for mistrial on the grounds that extensive publicity prejudiced the jurors were made and denied. A judgment of conviction was entered pursuant to the verdict, and a motion for a new trial was denied on April 8, 1969.

The sentence imposed on petitioner Gantt was a prison term of one year and one day under the fourth count of the indictment. Five year concurrent suspended sentences were assessed under the first two counts. He was not charged under count three and was not fined.[1]

Notice of appeal of the federal conviction was duly made and the Court of Appeals for the Fifth Circuit, Judge Rives dissenting, affirmed the judgment on June 23, 1971. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was submitted to the court of appeals. It was denied on October 7, 1971.

b. *The Facts*

The grand jury which indicted petitioner was composed of eighteen white males and three black males. They were selected from a list of names which was compiled in the following manner.[2]

First 1,754 men were selected by contacting the heads of

[1]Messrs. Hyde and Flowers were convicted under all four counts of the indictment and were fined under counts one and two of the indictment and sentenced to eight year prison terms, to run concurrently, on each count.

[2]The description is taken from the opinion of the court of appeals which is printed in the separately filed Appendix. A8-A22.

various state organizations and asking for the names of the officers of the local organizations or institutions in the counties of the district.[1] Letters were then sent to these men asking for "the names of men and women in your organization, and others, whom you think would make good jurors." The names of 18,715 jurors were produced to whom questionnaires were sent.[2] Eleven thousand of the questionnaires were returned and 7,000 of these were determined to be qualified to be placed in the jury box. These names, together with 7,000 names of jurors on hand, were used to select 6,000 prospective qualified jurors for the box.[3]

The selection of the 6,000 jurors was made by the jury commissioner by allocating to each of the thirty-one counties comprising the district the proportionate number of jurors to which the county was entitled based on the 1960 census of its population in relation to the total population of the district. In addition, the respective counties of the district were allocated jurors divided into four broad categories — farmers, merchants, bankers and others.

By the time the petit jury was called, the Jury Selection and Service Act of 1968 was in effect. It provides that

> [n]o citizen shall be excluded from service as a

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[1]The key men represented the American Legion, V.F.W., civic and fraternal organizations, labor organizations, Masonic lodges, bankers, judges of probate, county superintendents of education, city superintendents of education, Jeanes teachers and special supervisors, county agents, home demonstration agents, and agricultural stabilization and conservation service officers. A17.

[2]A letter accompanied the questionnaire, requesting but not purporting to require that the questionnaire be returned. If the questionnaire was not returned, that prospective juror's name was not used, making jury service essentially voluntary.

[3]It appears from the record that the source of the 7,000 names already on hand was a portion of a jury list compiled in 1959. A10-A11.

> grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status. 28 U.S.C. § 1862.

The Jury Selection and Service Act, 28 U.S.C. § 1863(b)(2), provides for the use of voter registration lists as the source of names for the jury wheel except where such lists would not provide a fair cross-section or would result in racial or other discrimination. The petit jury which tried petitioner was drawn from this source.

The prosecution of petitioners occasioned extensive newspaper publicity. The district court, however, refused to sequester the jury, denied requests that the proceeding in question be declared a mistrial, and refused to grant a new trial or a hearing on the prejudicial effects of the publicity. The court admonished the jurors not to read news stories or listen to broadcasts about the trial. It once asked the jury as a whole if any juror had come into contact with prejudicial publicity that would prevent him from impartially deciding the case on the basis of the evidence introduced in court.

Reasons for Granting the Writ

I. *Certiorari should be granted to reconcile, with decisions of this Court and other courts of appeals, the decision of the Court of Appeals for the Fifth Circuit that the trial court's jury charge*[1] *neither improperly limited nor*

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[1] As noted in Judge Rives' dissenting opinion, the district court instructed the jury as follows:

> (1) "Now, Ladies and Gentlemen of the jury, it is the duty of the Court and the jury to determine whether the government's evidence, if believed, establishes that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.
>
> "I instruct you that if you find from the evidence beyond

[footnote continues on next page]

obscured the jury's consideration of the question of interference with interstate commerce under 18 U.S.C. § 1951(a), nor amounted to partial direction of the verdict which denied petitioner due process of law and his right

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a reasonable doubt that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected."

(2) "Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed."

(3) "As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act."

(4) "Now, extortion and commerce, as defined in the statute, are essential elements of proof that the government must meet before an offense can be proven under Title 18, Section 1951.

"Whether or not commerce has been affected is a matter of law for the Court to determine from the evidence, if believed.

"The proof of extortion by the evidence beyond a reasonable doubt is a matter for you, the jury, to determine."

See A78-A80.

to trial by jury under the fifth and sixth amendments of the Constitution of the United States.[1]

As Judge Rives noted in his dissenting opinion in this case (A76), "there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion." *Stirone v. United States,* 361 U.S. 212, 218 (1960).[2] The issue of interference with interstate commerce is not, therefore, a mere "jurisdictional element," as indicated by the majority opinion, but is an element of the crime which must be charged to the jury.

> It is not competent for the court in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged . . . *Sparf and Hansen v. United States,* 156 U.S. 51, 105 (1895).

Neither overwhelming evidence of guilt nor recognition that the trial court may rule as a matter of law that specific findings of fact made by the jury constitute interference with interstate commerce can deprive an accused of the right to have the jury reach a conclusion as to the facts. *Cf. Bollenbach v. United States,* 326 U.S. 607 (1946);[3]

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[1]Counsel for the defendants objected to the charge given the jury because

> I think the import of what your honor has said eliminates from the mind of the jury that they have the prerogative, if they do not believe the evidence relative to the existence of commerce or any effect on commerce, to reject that evidence. I would feel that under this instruction they wouldn't think that they had that right.

The court, however, overruled the objection. A83-A84.

[2]The provision of the Hobbs Act under which petitioner was charged is found at p. 3, *supra.*

[3]"It does not matter whether guilt may be spelt out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the

[footnote continues on next page]

Edwards v. United States, 286 F.2d 681, 682 (5th Cir. 1960).[1]

> The rule against directed verdicts of guilt includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of doing so by eliminating other relevant considerations if the jury finds one fact to be true. *United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969).

The instructions given by the district court to the jury had the effect of removing from the jury's consideration the facts underlying the issue of interference with interstate commerce. The jury charge was at best an ambiguous statement of the proper role of the jury which, when assessed in conjunction with previous statements made by the prosecutor and the court,[2] had the effect of limiting the jury's consideration of an essential element of the crime.

[footnote continued from preceding page]

federal courts." Bollenbach v. United States, *supra*, 326 U.S. at 614.

[1]In fact, even if a party fails to object to a jury charge which amounts to a directed verdict, the action of the court constitutes such harmful and prejudicial error that it will not be allowed to stand. *Cf.* United States v. Martin, 434 F.2d 275 (5th Cir. 1970); Mims v. United States, 375 F.2d 135 (5th Cir. 1967).

[2]*See, e.g.*, the following exchange which implied that the jury was not to worry about interstate commerce and which implication was never clarified for the jury:

> "MR. TAYLOR: May it please the Court, ladies and gentlemen, my name is Macey Taylor, Assistant to Mr. Weaver [the United States Attorney]. I will assist him in the prosecution of the case. I would like to reply, with the Court's permission, to very few things that distinguished counsel said to you and they may have been inadvertently misleading.

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At no time was the jury given to understand that the ambiguous use of the words "if believed" in the jury charge should be construed to mean "if believed by the jury," "if believed by you," or "if believed beyond a reasonable doubt by the jury," the accepted charge in other circuits. *Cf. Hulahan v. United States,* 214 F.2d 441 (8th Cir. 1954),

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> "It is quite true that the effect on interstate commerce is an element of this offense, but each of us has a duty to perform in this case. Counsel will introduce evidence and make objections as was stated and you will be judges of the facts and the Court will make certain determinations. And I submit to you that it is the Court's function and not yours to find, that — first that interstate commerce existed and that the act involved affected, impeded, or delayed interstate commerce.
>
> "MR. REDDEN: We object to that incorrect statement of law, please the Court, because that might have to be found from disputed fact. That would be the province of the jury in every instance, not the Court.
>
> "MR. TAYLOR: We submit it is the Court's function to determine interstate commerce and its effect on it.
>
> "THE COURT: At this time I will let it stand.
>
> "MR. REDDEN: We except.
>
> "MR. TAYLOR: In spite of what counsel told you, you might be vitally concerned with all the facts in the case, you need not concern yourself with commerce, interstate commerce affected, impeded, or obstructed.
>
> "MR. REDDEN: We object to that and move to exclude it, please the Court. That is simply incorrect with reference to the fact that they would have no function.
>
> "MR. TAYLOR: Your Honor, that's the court's function.
>
> "THE COURT: It may be. It is possible.
>
> "MR. TAYLOR: Well, the Court will instruct you on the law of this case. I believe he will instruct you that it is the Court's function to determine whether or not interstate commerce has been established and affected or impeded or obstructed. If it hasn't, he will take the case away from you."

The exchange is noted in Judge Rives' dissent. A77-A78.

cert. denied, 348 U.S. 856; *United States v. Lowe,* 234 F.2d 919 (3d Cir. 1956), *cert. denied,* 352 U.S. 838; *United States v. Green,* 246 F.2d 155 (7th Cir. 1957) *cert. denied,* 355 U.S. 871.[1]

According to Judge Rives, in his dissenting opinion,

> Since the decision in *Sparf and Hansen,* it has been true in federal and most other American courts that the jury's right to return a general verdict in criminal cases gives it a naked power, but not a moral or legal right to determine the law upon its own initiative regardless of the court's instruction. . . . The majority decision in the present case not only seeks to destroy that "power" of the jury but goes much further and substitutes the judge for the jury as the finder of facts. To swing the judicial pendulum that far is, I submit, in clear violation of the defendants' constitutional rights. A91-A92.

Certiorari should be granted to resolve the conflict between the decisions of other courts, including this court, and that of the fifth circuit majority in this case, so as to ensure that petitioner was afforded the due process of law and the full trial by jury to which he is entitled.

II. *Certiorari should be granted to determine whether*

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[1]Although the trial judge declared that he had underlined the words "if believed" and had emphasized the phrase when giving the charge,

> the jury did not take the charge with them and had no means of knowing that the Judge had underlined in red "if believed." Even if the jurors had seen the red underlining or had heard some vocal emphasis, which the record cannot reproduce, placed on the words "if believed," they could not equate such an instruction with "if believed *by the jury*. . . ." [Emphasis in original.] Opinion of the Court of Appeals, Judge Rives, dissenting. A85.

petitioner's conviction under an indictment returned by a pre-Jury Selection and Service Act of 1968 grand jury deprived petitioner of due process of law and of his right to a grand jury representing a fair cross-section of the community because:

A. *The method of compiling the list of names from which the grand jury was drawn utilized a "key man" system of selection which reposed unsupervised discretion in selection of names in the key men; and*

B. *Seven thousand names drawn from a stale jury list were added to the list of prospective jurors supplied by the key men.*[1]

A. *The key man system of grand juror selection is illegal and unconstitutional.*

> The Constitution and laws of the United States place an affirmative duty on the court clerk and the jury commissioner to develop and use a system that will probably result in *a fair cross-section of the community being placed on the jury rolls. Rabinowitz v. United States,* 366 F.2d 34, 57 (5th Cir. 1966). [Emphasis added.]

---

[1]The district court denied petitioner's motion to dismiss the indictment which was returned by a grand jury which petitioner contends did not represent and was drawn from a list which did not represent, a fair cross-section of the community.

> Congress in prescribing the qualifications for jurors [under the federal jury selection act in effect at the time this indictment was returned] has attempted to insure a fair cross-section. . . . Any attempt to gain competent jurors that would result in a less representative cross-section than a selection drawn from the statutorily qualified pool would destroy the "right" to serve on juries which Congress intended to confer, as well as destroy the broad based cross-section Congress has designated for federal juries. Rabinowitz v. United States, 366 F.2d 34, 55 (1966).

Where, as here, an analysis of the method of juror selection suggests that the method probably cannot produce representative jury panels, the burden shifts to the government to show that no group has been excluded.[1] And here, although not the ground for his dissent, Judge Rives had "strong misgivings as to the composition both of the grand jury and of the petit jury." A92.

The jury roll, comprised of names suggested by key men,[2] was not selected from "the broad base it was designed by Congress to have in our democratic society," *Ballard v. United States*, 329 U.S. 187, 195 (1946).[3] There was no

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[1]Such a shift in burden of proof is required as to the issue of grand jury composition. According to the 1960 census, 79.2 percent of the adult population of the Northern District of Alabama was white and 20.8 percent, Negro. Males comprised 47.4 percent of the population, and females, 52.6 percent. The grand jury that indicted petitioners was all male (the mathematical probability of such a jury being drawn at random is 0.0000002, that is, one chance in five million) and contained only three Negroes (the mathematical probability of this ocurring is 0.2, that is, one chance in five).

[2]The key men utilized in the jury selection system here were the leaders of the white male community, representing in large part Alabama state officialdom (the only federal officials named being those of the notoriously white-oriented local agencies of the Department of Agriculture). These men were supplemented by contacts with the American Legion, luncheon, civic, and fraternal organizations, chambers of commerce, organized labor, and organized business. A single Negro organization was consulted, while women's groups appear not to have been consulted at all.

There was no attempt to reach the poor; there was no mention of social or welfare agencies, or charities. Laborers were reached only if they were organized and hence an economic cut above the average Southern laborer.

[3]Not even the jury commissioner or clerk expected a cross-section of the community, for the selection system which they utilized contemplated that names submitted for jury duty could be broken down into four categories: bankers, merchants, farmers, and others.

incorporation into the key man system utilized in the Northern District of Alabama of factors which would insure cross-sectional representation. *See, e.g., Brooks v. Beto* 366 F.2d 1 (5th Cir. 1966) (the key men's suggestions were supplemented from other sources to round out the cross-section); *United States v. Hunt,* 265 F. Supp. 178 (W.D. Tex. 1967) 400 F.2d 306 (1968), *cert. denied,* 393 U.S. 1021 (1969) (full-time jury commissioner carefully shepherds every step of the process).

In addition, the discretion reposed with the key men, who were unsupervised and answerable to no one, provided undue opportunity for discrimination, although such discrimination may have been unintentional. *Cf. Whitus v. Georgia,* 385 U.S. 545 (1967); *Avery v. Georgia,* 345 U.S. 559 (1953); *United States v. Mississippi,* 380 U.S. 128 (1965); *Louisiana v. United States,* 380 U.S. 145 (1965); and *Witcher v. Peyton,* 405 F.2d 745 (4th Cir. 1969).[1]

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[1]For instance, in the Northern District of Alabama, the key men were instructed to

> select only such men and women as you would want to pass on a case involving your life, liberty or property. *See* n.8, A10.

As this Court noted in Carter v. Jury Commission of Greene County, 396 U.S. 320, 322 (1970):

> Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

But here, a subjective quest, in which the selection of jurors is given to a particular interest group with *carte blanche* to select only those jurors who will diligently protect the interests of the selectors, cannot result in a jury list representing a cross-section of the community. Moreover, a federal rather than a state jury system is in question.

Even though the jurors selected by the key men may have been

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"Congress in prescribing the qualifications for jurors has attempted to insure a fair cross-section and has severely limited the court's discretion." *Rabinowitz v. United States, supra,* 366 F.2d at 55. If the district judge, the traditional and respected repository of discretion, has had his discretion "severely limited," then it would be "anomalous . . . to silently vest even broader discretion in the unregulated hands of the clerk and jury commissioner." *Id.* at 53.

In *Williams v. Georgia,* 349 U.S. 375, 382 (1955), this Court said:

> It was the system of selection and the resulting danger of abuse which was struck down in *Avery v. Georgia* and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists.

The key man system of selecting jury rolls which limits the names on the jury list to a relatively homogenous group of individuals and which vests with the key men unsupervised discretion in choosing jurors, is an intolerable and inherently unfair anachronism. This Court at least in the exercise of its supervisory powers over the federal court system should not uphold an indictment returned under the key man system.[1]

[footnote continued from preceding page]

upright, discreet, intelligent, and of sound judgment, *cf.* Turner v. Fouche, 396 U.S. 346, 354 (1970), the federal statutory scheme requires a cross-section of the community. Rabinowitz v. United States, supra, 366 F.2d at 55. See note 1, at 10, *supra.* The federal statutory standards "may not be extended by . . . broad and vague subjective tests . . . ." *Id.,* at 51.

[1]Congress explicitly abolished the key man system by the Jury Selection and Service Act of 1968, which became effective only a few months after the indictment in the present case was returned. The unfortunate fact that the indictment was returned only a few months prior to the effective date of the Act should not justify

[footnote continues on next page]

B. *Seven thousand names drawn from a stale jury list were added to the list of prospective jurors supplied by the key men.*

The clerk added to the names compiled by use of the key man system in 1963, the names of 7,000 individuals who had been on the 1959 jury list. *Cf.*, the jury list in *Whitus v. Georgia, supra,* 385 U.S. at 551, which utilized an old jury roll. Since the most recent jury wheel was filled in 1963, by the time petitioner was indicted all of the grand jurors had been eligible for at least five years, and half of them for nine years. Thus, the passage of time operated systematically to exclude otherwise qualified potential jurors under the age of 26 and half of those under 30. The large mobile sector of the population was also excluded.[1]

Even assuming that prejudices against placing affairs in the hands of Negroes, women, the young, or the poor may have been overcome by 1963, the list compiled in 1959 can hardly have been free of these biases, especially that against Negroes.[2] A "lingering imbalance," *cf. King v. Cook,* 297

[footnote continued from preceding page]

allowing the indictment to stand. The abolition of the key man system came through the political process, but:

> the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[1] *Cf.* the report on the 1968 Act, prepared by American University, *Cong. Rec.* E3685-92 (daily ed. May 6, 1969).

[2] A history of racial discrimination is judicially noticeable. *See, e.g.,* United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir.), *cert. denied,* 361 U.S. 828 (1962); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied,* 372 U.S. 915 and 924 (1963); and Smith v. Paris, 257 F. Supp. 901,

[footnote continues on next page]

F. Supp. 99 (N.D. Miss. 1969), therefore, existed in the composition of the jury list from which the grand jury which indicted petitioner was drawn.

Jury service should democratize and serve as a constant reminder that each of us has a say in the affairs of government. This Court has moved to insure democracy of the ballot in declaring the equal right of every man to an equal vote, *e.g., Reynolds v. Sims,* 377 U.S. 533 (1964), and should allow no lesser principle to apply within the federal judiciary.

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas,* 311 U.S. 128, 130 (1940).

III. *Certiorari should be granted to determine whether the district court's failure to hold a hearing on the question of the composition of the petit jury as provided for by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1867, denied petitioner due process of law and a fair trial by a jury of his peers, especially since the district court itself expressed doubts about the jury plan.*

In court, motions were filed challenging the array of petit jurors. These were denied without hearing, the ruling being:

> THE COURT: Due to the fact that our jury plan has been approved by the Fifth Circuit and

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[footnote continued from preceding page]

904 (M.D. Ala. 1966), *modified and aff'd,* 385 F.2d 979 (5th Cir. 1967) (and cases there cited).

It was not until 1966 that a federal court made women eligible for service on Alabama state court juries. *See* White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).

> adopted by this court, I will overrule your motion.
>
> I personally have some grave doubts about the plan's exclusion of certain classes of people,[1] however that is something which the Fifth Circuit would ultimately have to determine, and they have already determined that it is all right.[2]

At least since 1900 the federal judiciary has required that state courts provide criminal defendants a hearing and an opportunity to prove their allegations of jury discrimination. *See Carter v. Texas*, 177 U.S. 442 (1900). *Cf. Mobley v. United States*, 379 F.2d 768 (5th Cir. 1968) and *Scott v. Walker*, 358 F.2d 561 (5th Cir. 1966). Here, the federal district court, however, summarily denied the challenge to the petit jury on the ground that the plan had been approved by the Judicial Council, rather than allowing the presentation of "testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence." 28 U.S.C. § 1867(d).

The majority of the court of appeals itself was bothered because

> . . . The district judge may have thought the approval of the Fifth Circuit Judicial Council automatically validated the jury selection plan, im-

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[1] Compare Judge Rives' statement that "I have strong misgivings as to the composition . . . of the petit jury." A92.

[2] *See* the transcript of proceedings in the district court, at 27. The plan for selection of the petit jury to which the court referred requires that jurors "be selected at random from the voter registration lists of all of the counties within the district." No other source is provided. The plan contains no reasons or discussion for its conclusion that voter registration lists represent a cross-section of the community.

> plying that a party could not challenge a plan in district court after the Council approved it. Any such conclusion would be erroneous. The statute itself refers to the procedure by which a defendant or a party to an action may attack the validity of the plan, thereby making such an attack proper. 28 U.S.C. § 1867. Grave constitutional questions would arise from any effort to substitute prior Judicial Council approval for judicial determination of the issue in a live case presented by adversary parties. A. 26, n. 23.

The district court relied specifically on a presumed validity of the jury plan which had been approved by the Fifth Circuit in denying the challenge to the petit jury. This Court should, therefore, grant certiorari to correct the misapprehension of the district court that a judicial determination as to the jury plan's validity is foreclosed if a judicial council has approved the plan.

IV. *Certiorari should be granted to resolve an apparent conflict in principle which arises from the court of appeals' substitution of a subjective finding that no prejudicial publicity existed, for the objective inquiry into repeatedly-alleged prejudicial effects of publicity on jurors, which petitioner requested and the trial court failed to grant.*

As noted by the court of appeals, "the prosecution of the defendants received extensive publicity both before and during the trial." A60. Because of the anticipated publicity, a request was made that the jury be sequestered. It was denied. Throughout the trial, various news stories were brought to the attention of the court in support of motions for mistrial. The motions were denied. At the conclusion of the trial, a request was made for a hearing on the issue of jury prejudice. It was also denied. The failure of the trial court at least to question the jurors concerning possi-

ble prejudicial effects of alleged news stories was improper, as was the denial of motions for sequestration and mistrial.[1]

More important, the test which the court of appeals adopted in ruling on the issue of the prejudicial effect of the publicity is improper in that it is contrary to principles which guarantee a fair and impartial trial by jury. The court of appeals concluded that "the publicity was not prejudicial," and, therefore, found "no need to determine the adequacy of the trial judge's steps to ensure that the jurors were not exposed to any news media discussion of the case." A61, n.38.

It is inconsistent with principles underlying the guarantee of a trial by impartial jury summarily to deprive a criminal defendant of a right to question jurors. If extensive publicity occurs before a trial, examination of jurors as to prejudicial effect may be had at *voir dire*. *United States v. Silverthorne*, 430 F.2d 675 (9th Cir. 1970) *cert. denied*, 400 U.S. 1022. If extensive publicity occurs during a trial, a criminal defendant should have no less a right to examine unsequestered jurors. Otherwise, the defendant will not be "given ample opportunity to prove that he has been denied due process of law" because of trial by a biased jury. *Cf.*, *United States v. Handy*, 351 U.S. 454, 462 (1956) (Defendant was given an opportunity to question.)

When the jury's impartiality is alleged to have been destroyed by contact with a third party, prejudice is assumed in the form of a rebuttable presumption. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Ladd v. State of South Carolina*, 415 F.2d 870 (4th Cir. 1969) *cert. denied*, 397 U.S. 1049 (1970). Although contact with extensive publicity is not necessarily presumed to prejudice a juror, *cf.*, *Aiuppa v. United States*, 393 F.2d 597 (10th Cir. 1968), *vacated* 394 U.S. 310 (1969), when an allegation is made

[1] *See* the majority opinion in the court of appeals which suggests that the district court misunderstood its role regarding questioning the jury about prejudice. *See* n.38, A61-A62.

that news publicity has prejudiced the jurors, courts do permit the jury to be questioned. *Cf. United States v. Hutul,* 416 F.2d 607 (7th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *United States v. Rubino,* 431 F.2d 284 (6th Cir. 1970) *cert. denied,* 401 U.S. 910. Although one court of appeals has indicated that inquiry may be made into the "prejudicial content" of whatever is said to have influenced a juror, it also emphasized the fact that the defense lawyer had an opportunity to question the jurors before concluding that "all reasonable possibilities of prejudice have been completely negatived." *Ellis v. State of Oklahoma,* 430 F.2d 1352, 1355 (10th Cir. 1970) *cert. denied,* 401 U.S. 1010.

Here, the many alleged possibilities of prejudice arising from the extensive news coverage of petitioner's trial were not negatived, for petitioner was not even given a hearing on prejudice. In fact, even when a news story contained admittedly speculative material, the trial court did not conduct an inquiry.

> THE COURT: Well, it is unfortunate. I, of course, had hoped that no speculative story would be put in the papers; however, I have got to depend upon the integrity of the jury.
>
> I have instructed them very carefully everytime they have gone out of this courtroom about not reading any newspaper articles about the trial of this case and based on their oath and on my belief in their integrity, I am going to assume that they have not read this article and deny the motion for mistrial.

As so aptly stated by this Court,

> [t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence whether of private talk or

public print. *Patterson v. Colorado*, 205 U.S. 454, 462 (1970).

Where, as here, news publicity is extensive, it is contrary to all principles of justice to permit a court of appeals to substitute its own characterization of what is prejudicial for an objective inquiry into the existence of prejudicial influence on a jury.

CONCLUSION

For the above reasons, petitioner respectfully requests that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Petitioner Gantt adopts the averments of the petitions for certiorari submitted to this Court by Oscar E. Hyde and Richmond M. Flowers.

Respectfully submitted,

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Nos. 71-611, 71-618 and 71-625

In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

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UNITED STATES

JOE BRECK GANTT, PETITIONER

v.

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RICHMOND M. FLOWERS, PETITIONER

v.

UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

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OSCAR E. HYDE, JOE BRECK GANTT AND RICHMOND M. FLOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A92) is reported at 448 F. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1971. A petition for rehearing was denied on October 7, 1971. The petitions for writs of certiorari were filed on November 3, 5 and 6, 1971.[1] The

[1] The petition of Hyde was filed on November 3, 1971, that of Gantt on November 5, 1971, and that of Flowers on November 6, 1971.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand and petit juries were legally constituted.

2. Whether the trial court erred in instructing the jury that, if the government's evidence was believed, as a matter of law interstate commerce was affected for purposes of the Hobbs Act, 18 U.S.C. 1951.

3. Whether petitioners were denied due process because of newspaper publicity during the trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioners were convicted on two counts of conspiracy to extort, and on substantive counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioners Hyde and Flowers were sentenced to concurrent prison terms of eight years. Additionally, Hyde was fined $10,000 on each of the two conspiracy counts and Flowers was fined $5,000 on each of the four counts on which he was convicted, a total of $20,000 each. Petitioner Gantt was sentenced to suspended, concurrent prison terms of five years on the two conspiracy counts, and he was sentenced to imprisonment for one year and a day on one substantive count. The court of appeals affirmed in a comprehensive opinion, one judge dissenting (Pet. App. A1–A92).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A1–A7), showed

that from 1963 to 1967 petitioner Flowers, then Attorney General of Alabama, and others conspired to extort payments from various life insurance companies and small loan companies under threat of the use by Flowers of his official position to prevent the companies from doing business in Alabama. The extortion payments were made under seemingly legitimate contracts for credit life insurance or advisory services which were, in fact, and were known by the parties to be, mere sham contracts for channeling payoffs to petitioners.

ARGUMENT

Petitioners raise again three claims which were fully discussed and rejected in the 66-page majority opinion of the court of appeals: the legality of the selection of the grand jury and the petit jury (Pet. App. A8–A26); the sufficiency of the court's instructions on the issue of interstate commerce (Pet. App. A43–A49); and the effect of newspaper publicity during the trial (Pet. App. A60–A66).

1. Petitioners contend that the grand jury which indicted them was illegally constituted because it was selected by a form of "key man" system and because the letter sent to the "key men" contained a sentence which allegedly added qualifications over and above the statutory standards. Citing *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), they claim that these factors resulted in serious underrepresentation of Negroes and women. They also claim that the petit jury was illegally constituted because the jury lists were made up solely from voter registration lists

which resulted in a serious underrepresentation of Negroes. Further, they contend that the trial court denied them a hearing on the composition of the petit jury in violation of the Jury Selection and Service Act of 1968.

The court of appeals rejected these contentions because petitioners, despite the fact that they had access to relevant records, presented no factual evidence to make out even a prima facie case of purposeful, systematic exclusion in the selection of either the grand jury or the petit jury.

Petitioners were indicted on August 2, 1968, prior to the effective date of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The "key man" system used to develop the grand jury list was not shown to be designed systematically to exclude any cognizable group. As the court of appeals pointed out, the "key man" system is not *per se* unconstitutional (Pet. App. A20). The two "last-minute" depositions submitted to the trial court by petitioners merely showed that the clerk of the court and his deputy, respectively, estimated that Negroes comprised 6.1 or 10 per cent of the jurors and women 7.4 or 20 per cent, while the 1960 census figures showed that Negroes comprised 20. per cent of the adult population of the district and women 52 per cent. (Pet. App. A9). It was unclear whether these estimates related to figures for the jury box, the venire lists, those appearing in response to jury summonses or actual jurors. The clerk also stated that an effort was made to obtain a cross-section of the population. The court found that

the underrepresentation of Negroes and women could be explained by non-discriminatory factors and that the percentages did not represent mere tokenism or "spectacular" underrepresentation which would have shifted the burden of explanation on the issue of the jury composition to the government (Pet. App. A16–A17).

The letter sent to the jury nominators contained the sentence, "I know you will give this matter your very careful consideration, and select only such men and women as you would want to pass on a case involving your life, liberty, or property." As the court below held, this did not, on its face, impose an unconstitutional condition. See *Carter* v. *Jury Commission,* 396 U.S. 320; *Turner* v. *Fouche,* 396 U.S. 346; *Jackson* v. *Morrow,* 404 F. 2d 903 (C.A. 5); *Hunt* v. *United States,* 400 F. 2d 306, 308–309. Moreover, when read in the context of the whole letter [2] and considering the fact that there was no showing that the "key men" were all men or all upper or middle class whites, the letter was clearly not unfair (Pet. App. A21–A22).[3]

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[2] The text of the letter is reproduced at Pet. App. A10, n. 8.

[3] Petitioner Flowers also raises the contention that the use of the 1963 jury list, augmented by the prior 1959 list, excluded all potential jurors under age 25, since the indictment was returned in 1968. He cites *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1), for the proposition that young adults—in that case between 21 and 34 years of age—constitute a cognizable group (Pet. 21–22). However, there, as here, the court found it unobjectionable that the jury box was filled in 1968 with jurors selected from a jury pool last filled in 1963. See *United States* v. *Bryant,* 291 F. Supp. 542, 544 (D. Maine).

For selection of the petit jury the voter registration lists were used as the sole source of names, in accordance with the plan of the District Court for the Northern District of Alabama adopted pursuant to the Jury Selection and Service Act of 1968 and approved by the Fifth Circuit Judicial Council. Petitioners here claim that the use of such lists resulted in an underrepresentation of Negroes because only 55 per cent of eligible Negroes were registered while 88 per cent of eligible whites were registered. At trial, petitioners had objected to the jury venire composition solely on the basis of the exemptions and excuses established in the jury selection plan (Pet. App. in court of appeals at 157–160). Since the categories of excuses and exemptions were reasonable, petitioners alleged no "facts which, if true, would constitute a substantial failure to comply with the provisions of [28 U.S.C. 1867]" (28 U.S.C. 1867(d)) and therefore, contrary to their claim, petitioners were not entitled to a hearing on the issue.[4] Petitioners' challenge with respect to the use of the voter registration lists was not raised at trial, and therefore under the relevant statute (28 U.S.C. 1867e) cannot be considered. In any event the court of appeals properly found that, even assuming the figures to be correct, the resulting representation of Negroes as 14 per cent of the juror source, rather than the 20 per cent which reflected their proportion of the population, did not reflect unconstitutional discrimination.

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[4] The court of appeals pointed out that it was not clear whether petitioners were, in fact, denied a hearing (Pet. App. A24).

2. Petitioners claim that the trial judge's instructions concerning whether their activities affected interstate commerce deprived them of their right to have the jury pass on this issue. The judge charged that if the jury believed the government's evidence,[5] then

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[5] The judge's charge to the jury included the following language (Pet. App. A47):

"Now, Ladies and Gentlemen of the Jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed, established that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

"I instruct you that if you find from the evidence beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

* * * * *

"Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed.

* * * * *

"As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act."